RECORD AND BRIEFS

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No. 15-118

In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL., PETITIONERS

v.

JESUS MESA, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
IRVING L. GORNSTEIN
Counselor to the Solicitor General
BRIAN H. FLETCHER
Assistant to the Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MARK B. STERN
MARY HAMPTON MASON
HENRY C. WHITAKER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Petitioners brought a civil action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), seeking damages from a U.S. Border Patrol agent who, while standing in the United States, fatally shot a Mexican citizen who was in Mexico. The questions presented are as follows:

1. Whether the claim in this case may be asserted under *Bivens*.

2. Whether the court of appeals erred in holding that the Mexican citizen lacked Fourth Amendment protections.

3. Whether the court of appeals erred in holding that the agent's alleged actions did not violate any clearly established substantive-due-process right under the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1-50) is reported at 785 F.3d 117. The panel opinion of the court of appeals (Pet. App. 54-108) is reported at 757 F.3d 249. An opinion of the district court (Pet. App. 120-140) is reported at 802 F. Supp. 2d 834.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2015. The petition for a writ of certiorari was filed on July 23, 2015, and was granted on October 11, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court created a common-law cause of action for dam-

ages against federal officials who allegedly violated a U.S. citizen's Fourth Amendment rights by conducting a warrantless search in the United States. In this case, petitioners seek to invoke *Bivens* to recover damages from a U.S. Border Patrol agent for the death of their son, a Mexican national, as the result of a shooting across the international border separating the United States and Mexico. Petitioners allege that the shooting violated standards for the use of force found in the Fourth and Fifth Amendments, and they contend that those constitutional provisions and the judicially created *Bivens* remedy should be extended to aliens injured outside this country.[1]

1. According to the allegations in petitioners' complaint, on June 7, 2010, petitioners' son, Sergio Adrián Hernández Güereca (Hernández), a 15-year-old Mexican national, was with friends in the cement culvert that separates El Paso, Texas, from Ciudad Juárez, Mexico. The international border runs down the middle of the culvert, and there is a fence at the top of the embankment on the U.S. side. Petitioners allege that Hernández and his friends were playing a game in which they crossed the border into the United States, ran up the embankment to touch the fence, and then ran back into Mexico. Pet. App. 144-146.

Petitioners allege that respondent Jesus Mesa, Jr., a U.S. Border Patrol agent, arrived on the scene,

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[1] This brief is filed on behalf of the United States, which was a party to the proceedings in the court of appeals. Pet. App. 1-2. Although petitioners have not sought this Court's review of the aspects of the decision below affirming the dismissal of their claims against the United States and the other entities and individuals represented by the Department of Justice, the United States is a respondent under Supreme Court Rule 12.6.

detained one of Hernández's friends in the culvert on the U.S. side of the border, and then, while standing in U.S. territory, fatally shot Hernández, who was in Mexico at the time and who "had no interest in entering the United States." Pet. App. 146-147. Petitioners further allege that Hernández was "unarmed and unthreatening" at the time. *Id.* at 147.

After a "comprehensive" investigation of the incident, the Department of Justice (DOJ) declined to bring criminal charges against Agent Mesa. DOJ, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca* (Apr. 27, 2012) (*DOJ Statement*).[2] DOJ explained that the shooting "occurred while smugglers attempting an illegal border crossing hurled rocks from close range at [Agent Mesa,] who was attempting to detain a suspect." *Ibid.* DOJ added that its investigation indicated that Agent Mesa "did not act inconsistently with [U.S. Border Patrol] policy or training regarding use of force." *Ibid.* DOJ's statement expressed the United States' regret about Hernández's death, and it reiterated the United States' commitment to investigating and prosecuting allegations of excessive force and "work[ing] with the Mexican government * * * to prevent future incidents." *Ibid.*

2. Petitioners sued the United States, several federal agencies, and unknown U.S. Border Patrol agents, asserting claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*; the Alien Tort Statute (ATS), 28 U.S.C. 1350; and *Bivens*. Pet. App. 122 & n.3. Petitioners later named Agent Mesa as one of the individual defendants, alleging that he violated Her-

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[2] https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-sergio-hernandez-guereca.

nández's Fourth and Fifth Amendment rights while attempting to apprehend him on suspicion of illegal entry into the United States. *Id.* at 151.

a. The district court dismissed petitioners' FTCA and ATS claims. Pet. App. 120-140. Under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, an FTCA claim against the United States is generally the exclusive remedy for torts committed by federal employees within the scope of their employment. 28 U.S.C. 2679(b)(1). In this case, DOJ certified that Agent Mesa and the other individual defendants were acting within the scope of their employment. Pet. App. 125; see 28 U.S.C. 2679(d)(1). Petitioners did not challenge that certification and did not oppose the substitution of the United States as the sole defendant for their FTCA and ATS claims. Pet. App. 125-126.

The FTCA generally makes the United States liable for torts committed by federal employees within the scope of their employment, but excludes "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). That exclusion "bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004). Here, the district court dismissed petitioners' FTCA claims because Hernández was in Mexico when he was shot. Pet. App. 133-134.

The ATS grants district courts jurisdiction over certain suits by aliens "for a tort * * * committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. 1350. The district court dismissed petitioners' ATS claims because no provision of law

waives the United States' sovereign immunity for such claims. Pet. App. 136-137.

b. The district court also dismissed petitioners' *Bivens* claims against Agent Mesa. Pet. App. 109-119. Those claims were not barred by the Westfall Act, which exempts suits "brought for a violation of the Constitution." 28 U.S.C. 2679(b)(2)(A). But the court concluded that petitioners' Fourth Amendment claim was foreclosed by *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 274-275 (1990), which held that the Fourth Amendment had no application to the search and seizure of a Mexican citizen's property in Mexico. Pet. App. 113-117. And the court concluded that petitioners' Fifth Amendment claim was barred by *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), which held that a claim that a law enforcement officer used excessive force in making a seizure can arise only under the Fourth Amendment, not the more general rubric of substantive due process. Pet. App. 117-118.[3]

3. Initially, a three-judge panel of the court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 54-108.[4]

a. The panel held unanimously (albeit based on somewhat different rationales) that the Fourth Amendment did not apply to Agent Mesa's alleged actions because Hernández was in Mexico when he was shot. Pet. App.

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[3] The district court granted summary judgment to the other individual defendants because petitioners failed to offer evidence that the defendants' acts and omissions in supervising Agent Mesa proximately caused Hernández's death. Pet. App. 59-60. Those claims are not at issue here.

[4] The panel affirmed the district court's rejection of petitioners' claims against the United States and the supervisory defendants. Pet. App. 60-65, 104.

71-80 (Prado, J.); *id.* at 105-106 (Dennis, J., concurring in part and concurring in the judgment); *id.* at 106-107 (DeMoss, J., concurring in part and dissenting in part).

b. The panel majority concluded, however, that Agent Mesa's alleged actions violated the Fifth Amendment, which the majority found applicable even though Hernández was in Mexico when he was shot. Pet. App. 80-89. The majority relied on *Boumediene* v. *Bush*, 553 U.S. 723 (2008), which held that the Suspension Clause of the Constitution, Art. I, § 9, Cl. 2, applies to certain aliens detained at the U.S. Naval Station at Guantanamo Bay, Cuba, where the United States lacks "*de jure* sovereignty" but exercises "*de facto* sovereignty" because of "its complete jurisdiction and control over the base." *Boumediene*, 553 U.S. at 754-755. The majority reasoned that *Boumediene* supported the extraterritorial application of the Fifth Amendment here because Hernández was "a civilian killed outside an occupied zone or theater of war," Pet. App. 82-83, and because he was in an area of Mexico near the border where the majority believed the United States exercises a degree of control sufficiently comparable to that which it exercises at Guantanamo Bay, *id.* at 84-86.

The panel majority further held that, although this Court has "consistently refused to extend *Bivens* liability to any new context," petitioners' claim on behalf of an alien injured abroad could be brought under *Bivens*. Pet. App. 89-90 (citation omitted); see *id.* at 89-99. The majority also held that Agent Mesa was not entitled to qualified immunity on petitioners' Fifth Amendment claim. *Id.* at 102-104.

c. Judge DeMoss dissented in part, concluding that "the Fifth Amendment does not protect a non-

citizen with no connections to the United States who suffered an injury in Mexico where the United States has no formal control or de facto sovereignty." Pet. App. 108.

4. The court of appeals granted petitions for rehearing en banc filed by the United States and by Agent Mesa. Pet. App. 51-53. The 15-member en banc court then affirmed the dismissal of petitioners' claims against Agent Mesa without dissent. *Id.* at 1-7.[5]

a. The court first held that petitioners had failed to allege a violation of the Fourth Amendment because Hernández was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot." Pet. App. 4 (quoting *Verdugo-Urquidez*, 494 U.S. at 271). Only two judges declined to join that reasoning. As at the panel stage, Judge Dennis concurred in the result. *Id.* at 31-32. He concluded that *Boumediene* requires a more pragmatic inquiry than the one he believed this Court applied in *Verdugo-Urquidez*, but he nonetheless determined that the Fourth Amendment is inapplicable here because "judicial entanglement with extraterritorial Fourth Amendment excessive-force claims" would be "impracticable and anomalous." *Id.* at 32. Judge Graves did not dissent from the court's Fourth Amendment holding, but his partial concurrence stated that the court "should carefully adjudicate" that claim. *Id.* at 50.

b. The court was "somewhat divided on the question of whether Agent Mesa's conduct violated the Fifth Amendment," but it was "unanimous" in holding

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[5] The en banc court reinstated the portions of the panel opinion rejecting petitioners' claims against the United States and the supervisory defendants. Pet. App. 4.

that he is entitled to qualified immunity because "any properly asserted right was not clearly established." Pet. App. 5. The court stated that "[r]easonable minds can differ on whether *Boumediene* may someday be explicitly extended" to provide extraterritorial application of the Fifth Amendment to aliens, but it held that "nothing in [*Boumediene*] presages, with the directness that the 'clearly established' standard requires, whether th[is] Court would extend the territorial reach of a different constitutional provision * * * and would do so where the injury occurs not on land controlled by the United States, but on soil that is indisputably foreign and beyond the United States' territorial sovereignty." *Id.* at 6.

c. Several judges filed concurring opinions. Judge Jones, joined by three of her colleagues, agreed with the district court that petitioners' excessive-force claim could arise, if at all, only under the Fourth Amendment, not the Fifth. Pet. App. 10-11. In any event, she would have held that the Fifth Amendment does not apply to aliens abroad. *Id.* at 16-20.

Judge Prado disagreed with Judge Jones about the merits of petitioners' Fifth Amendment claim, but agreed that Agent Mesa is entitled to qualified immunity because the Fifth Amendment's applicability to these circumstances is not clearly established. Pet. App. 32-43.

Judge Haynes, joined by two other judges, wrote separately to address petitioners' ATS claim, which is not at issue here. Pet. App. 43-49. She also observed, however, that petitioners' "concern that people in Mesa's situation can commit wrongful acts with impunity is not accurate." *Id.* at 49 n.5. She noted, for example, that petitioners could have sought "federal-

court review of the Attorney General's scope-of-employment certification," which could have permitted them to pursue ATS claims against Agent Mesa, as well as tort claims under state or Mexican law. *Id.* at 48. She also stated that redress may be available "through Mexican diplomatic channels." *Id.* at 49 n.5; see *id.* at 30 (Jones, J., concurring) (same).

d. Because it rejected petitioners' Fourth and Fifth Amendment claims on other grounds, the en banc court did not consider whether *Bivens* should be extended to this novel context.

SUMMARY OF ARGUMENT

I. In granting certiorari, this Court directed the parties to address the question whether petitioners' claims may be asserted under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). That antecedent question resolves this case: The judicially created *Bivens* remedy should not be extended to aliens injured abroad.

In *Bivens*, this Court recognized an implied private right of action for damages against federal officers alleged to have violated a citizen's Fourth Amendment rights. But because the Court's subsequent decisions have clarified that "implied causes of action are disfavored," the Court has long "been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) (citation omitted). And the Court has admonished that *Bivens* should not be extended to any new context where special factors suggest that Congress is the appropriate body to provide any damages remedy.

Petitioners seek to extend *Bivens* to injuries suffered by aliens abroad—a significant and unprecedented expansion. That expansion is inappropriate

because Congress, not the Judiciary, should decide whether and under what circumstances to provide monetary remedies for aliens outside our borders who are injured by the government's actions. An injury inflicted by the United States on a foreign citizen in another country's sovereign territory is, by definition, an incident with international implications. This case illustrates that point: Both the problem of border violence in general and the specific incident at issue here have prompted exchanges between the United States and Mexico, and Mexico's amicus brief confirms its sovereign interest in those issues.

The need for caution before inserting the courts into such sensitive matters of international diplomacy is reinforced by the fact that, in a variety of related contexts—including the statutory remedy for persons deprived of constitutional rights by *state* officials, 42 U.S.C. 1983—Congress has taken care not to provide aliens injured abroad with the sort of judicial damages remedy petitioners seek. Instead, where Congress has addressed injuries inflicted by the government on aliens abroad, it has relied on voluntary payments or administrative claims mechanisms. And the general presumption against extraterritoriality further confirms that *Bivens* should not apply here: It would be anomalous to extend a judicially inferred remedy to a case where the Court would not extend an express statutory cause of action absent a clear indication that Congress intended to reach injuries outside our Nation's borders.

II. The en banc court of appeals held that the Fourth Amendment did not apply to Agent Mesa's alleged conduct because Hernández was an alien located in Mexico who had no connection to the United

States. That conclusion was compelled by *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), which held that the Fourth Amendment had "no application" to the search and seizure of an alien's property in Mexico. *Id.* at 275. This Court reached that conclusion after a careful analysis of the Fourth Amendment's text, purpose, and history, as well as the "significant and deleterious consequences for the United States" that would follow from extending the Fourth Amendment to aliens abroad. *Id.* at 273.

Petitioners do not deny that *Verdugo-Urquidez* forecloses their claim. Instead, they assert that *Verdugo-Urquidez* is no longer good law because it employed an approach to extraterritoriality that purportedly conflicts with Justice Kennedy's concurring opinion in that case and with this Court's subsequent decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008). But Justice Kennedy "join[ed]" the Court's opinion in *Verdugo-Urquidez* and agreed with the "persuasive justifications stated by the Court." 494 U.S. at 275, 278 (Kennedy, J., concurring). And nothing in *Boumediene*—which addressed the application of the right to habeas corpus in an area where the United States maintains de facto sovereignty—undermines either *Verdugo-Urquidez*'s analysis or its holding that the Fourth Amendment generally does not apply to aliens abroad.

In contrast, petitioners' ad hoc, totality-of-the-circumstances approach to the extraterritorial application of the Fourth Amendment finds no support in *Boumediene* or in any other decision of this Court. Petitioners' all-factors-considered test is unworkable; it would upend an understanding on which Congress and the Executive Branch have relied; and it could "significantly disrupt the ability of the political branch-

es to respond to foreign situations involving our national interest," *Verdugo-Urquidez*, 494 U.S. at 273-274.

III. Agent Mesa is entitled to qualified immunity on petitioners' substantive-due-process claim because his alleged actions did not violate any clearly established Fifth Amendment right. To overcome a motion to dismiss based on qualified immunity, a *Bivens* plaintiff must plead facts establishing that "every reasonable official" in the defendant's position would have known that his actions violated the asserted constitutional right. *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (citation omitted). The dispositive question here is thus whether "every reasonable official" in Agent Mesa's position "would have understood that what he is doing violates [the Fifth Amendment]." *Ibid.*

Petitioners do not dispute the court of appeals' unanimous conclusion that it was not clearly established that an alien in Hernández's position had Fifth Amendment rights. Instead, petitioners maintain (Br. 28-33) that the court should have conducted the qualified-immunity analysis as if Hernández were a U.S. citizen because Agent Mesa did not know with certainty that he was an alien. Petitioners are correct that the qualified-immunity analysis focuses on facts known to the defendant at the time of the challenged conduct. But it does not follow that the analysis in this case should assume, counterfactually, that Agent Mesa knew Hernández was a U.S. citizen. Instead, the question is whether every reasonable officer in Agent Mesa's position would have known that his alleged actions violated the Fifth Amendment, where the officer did not know Hernández's nationality with certainty but had no reason to believe that he was a U.S. citizen.

The answer to that question is no—both because no case law addresses the application of the Fifth Amendment to uses of force against persons of unknown nationality outside the United States, and because it is not clearly established that the Fifth Amendment (rather than the Fourth Amendment) has any application to such uses of force, regardless of the nationality of the affected individual.

ARGUMENT

I. THE JUDICIALLY CREATED *BIVENS* REMEDY SHOULD NOT BE EXTENDED TO ALIENS INJURED ABROAD

In granting certiorari, this Court directed the parties to address the question whether the claim in this case may be asserted under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The availability of a *Bivens* remedy is "antecedent" to the questions on which petitioners sought this Court's review. *Wood* v. *Moss*, 134 S. Ct. 2056, 2066 (2014). That antecedent question resolves this case. Even if petitioners were correct that the Fourth and Fifth Amendments protected Hernández in Mexico, and even if those rights were clearly established at the time of the incident, petitioners' claims were properly dismissed because *Bivens* should not be extended to aliens injured abroad.

A. This Court Has Consistently Declined To Extend *Bivens* To Contexts Where Congress Is The More Appropriate Body To Craft Any Damages Remedy

1. In *Bivens*, this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Servs. Corp.* v. *Ma-*

lesko, 534 U.S. 61, 66 (2001). The Court held that, despite the absence of such a remedy in the Fourth Amendment itself or in any statute, federal officers could be sued for damages for conducting a warrantless search in the United States. *Bivens*, 403 U.S. at 389. In creating that common-law cause of action, however, the Court emphasized that the context of the case presented "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396.

Since deciding *Bivens* in 1971, this Court has "extended its holding only twice." *Malesko*, 534 U.S. at 70. In *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court allowed a congressional employee to sue for sex discrimination in violation of the Fifth Amendment. *Id.* at 248-249. And in *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court allowed a federal prisoner to sue prison officials for Eighth Amendment violations. *Id.* at 19-23. In each case, the Court reiterated that it found "no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 19; see *Davis*, 442 U.S. at 245.

In the more than 35 years since *Carlson*, this Court "ha[s] consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko*, 534 U.S. at 68. Eight decisions of this Court squarely rejected efforts to expand *Bivens*. See *Minneci* v. *Pollard*, 132 S. Ct. 617, 626 (2012); *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007); *Malesko*, 534 U.S. at 74; *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412, 429 (1988); *United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987); *Bush* v. *Lucas*, 462 U.S. 367, 390 (1983); *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983). On three other occa-

sions, the Court sua sponte questioned the existence of a *Bivens* remedy even though the parties had not raised the issue. See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009); see also *Wood*, 134 S. Ct. at 2066; *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 n.4 (2012).

This Court's steadfast refusal to extend *Bivens* reflects its changed understanding of the scope of judicial authority to create private rights of action. *Bivens* "rel[ied] largely on earlier decisions implying private damages actions into federal statutes." *Malesko*, 534 U.S. at 67; see *Bivens*, 403 U.S. at 397 (citing *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964)); *Bivens*, 403 U.S. at 402-403 & n.4 (Harlan, J., concurring in the judgment) (same). But in the decades since *Bivens*, the Court has made clear that the creation of damages remedies is a legislative function, and it has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one." *Malesko*, 534 U.S. at 67 n.3. The Court has "repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004). And it has "declined to 'revert' to 'the understanding of private causes of action that held sway'" when *Bivens* was decided. *Malesko*, 534 U.S. at 67 n.3 (citation omitted). The Court has thus explained that its "reluctan[ce] to extend *Bivens*" rests on its more recent decisions clarifying that "implied causes of action are disfavored." *Iqbal*, 556 U.S. at 675.[6]

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[6] In addition to relying on statutory implied-right-of-action cases, Justice Harlan's *Bivens* concurrence argued that federal courts' authority to provide "*equitable* relief against threatened invasions of constitutional interests" suggested that courts have the

2. This Court's decisions establish two hurdles for a party seeking to extend *Bivens*. First, the presence of "any alternative, existing process for protecting the [relevant] interest" may be "a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. Second, "even in the absence of [such] an alternative," inferring a damages remedy under *Bivens* is still disfavored, and a court must determine whether judicially created relief is warranted, "paying particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Ibid.* (citation omitted); see *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 177 (1996) (Souter, J., dissenting) (*Bivens* is "a novel rule that a proponent has a burden to justify affirmatively on policy grounds in every context in which it might arguably be recognized").

The "special factors" that may foreclose the extension of *Bivens* are not limited to factors showing that a damages remedy would be inappropriate in a particular setting. They also include factors suggesting that Congress, not the judiciary, is the appropriate entity to make that legislative judgment—or that Congress's failure to provide a remedy "has not been inadvertent," *Schweiker*, 487 U.S. at 423. The special factors referenced in *Bivens* itself, for example, "related to

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power to fashion *damages* remedies absent congressional authorization. 403 U.S. at 404 (emphasis added). But "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history * * * tracing back to England." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). There is no comparable authority for judicial creation of damages remedies.

the question of who should decide whether [a damages] remedy should be provided," not "the merits of the particular remedy that was sought." *Bush*, 462 U.S. at 380. Consistent with that focus on congressional intent and institutional competence, this Court has asked "whether there are reasons for allowing Congress to prescribe the scope of relief that is made available." *Ibid.* And the Court has "decline[d] to create a new substantive legal liability without legislative aid" if "Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 390 (citation omitted); see *Wilkie*, 551 U.S. at 562; *Schweiker*, 487 U.S. at 425.[7]

B. Congress, Not The Judiciary, Is The Appropriate Body To Decide Whether To Provide A Damages Remedy For Aliens Injured Abroad By U.S. Officials

In asking this Court to create a *Bivens* remedy for an alien injured outside the United States, petitioners "seek[] a significant extension of *Bivens*." *Meyer*, 510 U.S. at 484. An injury inflicted by the U.S. government on a foreign citizen in another country's sovereign territory is, by definition, an incident with inter-

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[7] In 1988, Congress enacted the Westfall Act to protect federal employees from liability for torts committed within the scope of their employment. 28 U.S.C. 2679(b)(1). Congress exempted claims "brought for a violation of the Constitution of the United States." 28 U.S.C. 2679(b)(2)(A). But that exemption cannot be read as an implicit authorization for the expansion of *Bivens* because it was enacted against a backdrop of decisions holding that *Bivens* does not extend to any new context in which Congress, rather than the Judiciary, is the appropriate body to establish a damages remedy. See *Bush*, 462 U.S. at 379-380, 390; see also *Schweiker*, 487 U.S. at 421-423; *Stanley*, 483 U.S. at 679-684; *Chappell*, 462 U.S. at 304.

national implications. Claims based on such injuries thus affect the Nation's foreign affairs—and the nature of the government's activities abroad means that those claims will often implicate national security as well. Those special factors indicate that Congress, not the Judiciary, is the appropriate body to decide whether and under what circumstances to provide monetary remedies. The need for caution is reinforced by the fact that, in a variety of statutes, Congress has long taken care *not* to provide aliens injured abroad with the sort of judicial damages remedy petitioners seek. And the general presumption against extraterritoriality further confirms that *Bivens* should not be extended to this novel context.

1. Claims by aliens injured abroad implicate foreign affairs and national security

a. "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); see, *e.g.*, U.S. Const. Art. I, § 8, Cls. 3, 10, 11, 12, 13; Art. II, § 2. "[F]oreign affairs" is thus "a domain in which the controlling role of the political branches is both necessary and proper." *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1328 (2016). In recognition of the political branches' special competence and responsibility, this Court has long held that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981).

This Court's decisions make clear that *Bivens* should not be expanded to an area that the Constitution commits to the political branches. In *Chappell*, the Court declined to extend *Bivens* to claims by mili-

tary personnel against superior officers because "Congress, the constitutionally authorized source of authority over the military system of justice," had not provided such a remedy. 462 U.S. at 304. The Court explained that "[a]ny action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in this field." *Ibid.* And in *Stanley*, the Court relied on *Chappell* to hold that *Bivens* does not extend to any claim incident to military service, again emphasizing that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." 483 U.S. at 683.

The same logic precludes the extension of *Bivens* to aliens injured abroad by U.S. government officials. The United States is answerable to other sovereigns for injuries inflicted on their citizens within their territory, and such injuries thus inevitably have implications for foreign affairs. Judicial examination of the government's treatment of aliens outside the United States would inject the courts into sensitive matters of international diplomacy and risk "what [this] Court has called in another context 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.) (citation omitted). More generally, "damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad" could carry other "foreign affairs implications" that "cannot be ignored"—including "the danger of foreign citizens' using the courts * * * to obstruct the foreign policy of our government." *Ibid.*

This case illustrates the inevitable foreign-affairs implications of *Bivens* suits by aliens injured abroad. The Government of Mexico has filed an amicus brief explaining (at 3) that it has an interest in this case because, "[a]s a sovereign and independent state, Mexico has a responsibility to maintain control over its territory and to look after the well-being of its nationals." Issues of border violence, including cross-border shootings, have been of great concern to the United States' bilateral relationship with Mexico for several years. In 2014, the two governments established a joint Border Violence Prevention Council to provide a standing forum in which to address issues of border violence.[8] Mexico and the United States have also addressed cross-border shootings in other forums, including the annual U.S.–Mexico Bilateral Human Rights Dialogue.[9] And the incident at issue here has prompted bilateral exchanges, including Mexico's request that Agent Mesa be extradited to face criminal charges. Pet. App. 30; Mexico Amicus Br. 9. The United States declined to extradite Agent Mesa, but it has reiterated its commitment to "work with the Mexican government within existing mechanisms and agreements to prevent future incidents." *DOJ Statement*.

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[8] Dep't of Homeland Security, *Written Testimony for a House Committee on Oversight and Government Reform Hearing* (Sept. 9, 2015), https://www.dhs.gov/news/2015/09/09/written-testimony-dhs-southern-border-and-approaches-campaign-joint-task-force-west.

[9] See Governments of Mexico and the United States of America, *Joint Statement on the U.S.-Mexico Bilateral High Level Dialogue on Human Rights* (Oct. 27, 2016), https://www.state.gov/r/pa/prs/ps/2016/10/263759.htm (listing "the use of force at the border" as among the issues discussed).

Petitioners' suit seeks to insert the Judiciary into this sensitive diplomatic arena, and to have the courts adopt a view of the underlying incident that differs from the one taken by the Executive Branch. See p. 3, *supra*. Judicial involvement in such matters should come, if at all, only at Congress's invitation and under circumstances prescribed by the legislature.

b. Petitioners assert (Br. 47) that there should be no concern about interfering with U.S. foreign policy because the Government of Mexico supports the availability of a damages remedy in this case. But that only illustrates the problem. Petitioners ask this Court to make a judgment about whether the provision of a damages remedy to an alien injured abroad would be consistent with U.S. foreign policy. The Judiciary is ill-suited to make such determinations—and attempting to make them on a case-by-case basis would itself intrude on foreign affairs. See *Stanley*, 483 U.S. at 682 (rejecting "[a] test for liability that depends on the extent to which particular suit would call into question military discipline and decisionmaking" because such a test "would itself require judicial inquiry into, and hence intrusion upon, military matters"). "Congress is in a far better position than a court" to make the delicate judgments involved in providing remedies to aliens abroad who are injured by the government's actions, and to "tailor any remedy" as appropriate. *Wilkie*, 551 U.S. at 562 (citation omitted).

c. Opening the courthouse doors to *Bivens* suits by aliens injured abroad would also have implications for national security. Such suits might, for example, be brought based on military or intelligence activities. See, *e.g.*, *Sanchez-Espinoza*, 770 F.2d at 208. National

security is also implicated where, as here, the security of the border is at issue. The Department of Homeland Security (DHS) and its components, including the U.S. Border Patrol, have been charged by Congress with preventing terrorist attacks within the United States and securing the border. 6 U.S.C. 111, 202. "[T]his country's border-control policies are of crucial importance to the national security and foreign policy of the United States." *United States* v. *Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004), cert. denied, 544 U.S. 950 (2005). Many *Bivens* suits based on injuries to aliens abroad would thus add national-security considerations to the direct implications for foreign affairs inherent in *all* such litigation.[10]

2. Congress's consistent decisions not to provide a judicial damages remedy to aliens injured abroad confirm that a Bivens remedy is inappropriate

A variety of statutes indicate that Congress's failure to provide the judicial remedy petitioners seek "has not been inadvertent." *Schweiker*, 487 U.S. at

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[10] Petitioners contend (Br. 46) that, unlike other cases involving injuries to aliens abroad, this suit does not implicate national security and is instead akin to a matter of domestic law enforcement. But that assertion turns in part on their contested depiction of the facts. See p. 3, *supra*. Activities related to securing the Nation's borders often bear little resemblance to domestic law enforcement, see, *e.g.*, *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 160-164 (1993) (describing the Coast Guard's interdiction of tens of thousands of Haitian migrants), and courts are not well-suited to distinguish between border-protection activities that do and do not implicate national security. In any event, the question is whether special factors counsel against extending *Bivens* to the relevant *category* of cases. See *Wilkie*, 551 U.S. at 550; *Stanley*, 483 U.S. at 682.

423. Those related congressional policy judgments warrant "appropriate judicial deference." *Ibid.*

a. Traditionally, injuries suffered by aliens abroad were addressed through diplomatic negotiations or by voluntary *ex gratia* payments to the injured parties. See William R. Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 Mil. L. Rev. 59, 61-64 (1966); see *id.* at 64 n.22 (describing statutes providing for *ex gratia* payments). The United States continues to rely on such measures in many contexts. See, *e.g.*, Exec. Order No. 13,732, § 2(b)(ii), 81 Fed. Reg. 44,486 (July 7, 2016) (providing for *ex gratia* payments to civilians injured or killed by certain uses of military force).

In certain recurring circumstances, however, Congress has determined that the United States' interests would be better served by establishing administrative claims procedures. In 1942, during World War II, Congress enacted the Foreign Claims Act (FCA), 10 U.S.C. 2734, "[t]o promote and maintain friendly relations" with the increasing number of foreign countries in which U.S. military personnel were stationed. 10 U.S.C. 2734(a). The FCA allows the military to establish administrative claims commissions to pay certain claims for personal injuries, death, or property damage suffered by "any inhabitant of a foreign country" as a result of the noncombat activities of U.S. military forces. *Ibid.*

A companion statute, the International Agreement Claims Act, allows the military to make payments under "an international agreement which provides for the settlement or adjudication and cost sharing of claims against the United States arising out of the acts or omissions of a member or civilian employee of

an armed force of the United States." 10 U.S.C. 2734a(a). Such cost-sharing provisions are included in a number of status-of-forces agreements applicable to U.S. forces stationed abroad. See David P. Stephenson, *An Introduction to the Payment of Claims Under the Foreign and the International Agreement Claims Act*, 37 A.F. L. Rev. 191, 200 & nn.80-83 (1994).

More recently, Congress has enacted limited exceptions to the FTCA's foreign-country exclusion to allow payments for torts arising from the overseas operations of the Department of State, 22 U.S.C. 2669–1, and the Drug Enforcement Administration (DEA), 21 U.S.C. 904. In those statutes, as under the FCA, Congress provided an administrative remedy—it did not permit the injured parties to bring FTCA suits in court. And in establishing and shaping those limited remedies, Congress made considered decisions about which injuries to make compensable and under what conditions they should be compensated. See, *e.g.*, 10 U.S.C. 2734(b) (limitations on FCA claims).

Congress has not adopted a similar claims procedure for aliens injured abroad by the actions of U.S. Border Patrol agents. Instead, Congress has left such injuries to be addressed through diplomatic or other means. But these statutes provide further reason not to infer a *Bivens* remedy because they indicate that Congress has made deliberate choices about the circumstances under which to provide monetary remedies for aliens injured abroad—and because they show that where Congress *has* provided such remedies, it has done so through administrative mechanisms, not by authorizing suits in federal court.

b. Where Congress has provided judicial damages remedies, moreover, it has taken care not to extend

those remedies to injuries of the sort petitioners assert here. The statutory remedy for individuals whose constitutional rights are violated by *state* officials is limited to "citizen[s] of the United States or other person[s] within the jurisdiction thereof." 42 U.S.C. 1983; see *Breard* v. *Greene*, 523 U.S. 371, 378 (1998) (per curiam). Accordingly, if Agent Mesa were a state official, petitioners would have no remedy under Section 1983. See *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998). Petitioners identify no reason why *Bivens*—the "more limited * * * federal analog" to Section 1983, *Hartman* v. *Moore*, 547 U.S. 250, 254 n.2 (2006)—should sweep more broadly.

Similarly, in enacting the FTCA, the most comprehensive statute providing remedies for injuries inflicted by federal employees, Congress specifically excluded "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). That is a strong indication that Congress did not intend a damages remedy for injuries occurring abroad. Petitioners correctly observe (Br. 43) that the foreign-country exception was motivated in part by Congress's "unwillingness to subject the United States to liabilities depending upon the laws of a foreign power," which would have governed FTCA claims arising abroad. *Sosa*, 542 U.S. at 707 (brackets and citation omitted). But petitioners are wrong to suggest that avoiding the application of foreign law was Congress's only goal. Even before DOJ raised concerns about foreign law, the bill that became the FTCA excluded "all claims 'arising in a foreign country *in behalf of an alien*.'" *Ibid.* (quoting H.R. 5373, 77th Cong., 1st Sess. 8 (1941)) (emphasis added). That history demonstrates that Congress's decision not to provide an FTCA remedy to *aliens* injured abroad

reflected adherence to the traditional practice of addressing such injuries through nonjudicial means.

More recently, in the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. 1350 note, Congress created a cause of action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to "torture" or "extrajudicial killing." 28 U.S.C. 1350 note § 2. "But the statute exempts U.S. officials, a point that President George H.W. Bush stressed when signing the legislation." *Meshal* v. *Higgenbotham*, 804 F.3d 417, 430 (D.C. Cir. 2015) (Kavanaugh, J., concurring), petition for cert. pending, No. 15-1461 (filed May 31, 2016). "In confining the coverage of statutes such as the [FTCA] and the [TVPA], Congress has deliberately decided not to fashion a cause of action" for aliens injured abroad by government officials. *Ibid.* Congress's repeated decisions not to provide such a remedy counsel strongly against providing one under *Bivens*.[11]

3. *The presumption against extraterritoriality reinforces the inappropriateness of extending* Bivens *to aliens injured abroad*

The presumption against extraterritoriality further confirms that *Bivens* should not be extended to aliens injured abroad. It is a basic principle of our legal

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[11] Petitioners misunderstand the government's reliance on the FTCA and the administrative claims procedures Congress has made available for certain injuries abroad. The point is not, as petitioners suggest (Br. 41-43), that those mechanisms are available here. Rather, it is that Congress has made deliberate choices about whether and under what circumstances to provide remedies for aliens injured abroad, and has conspicuously declined to provide the sort of remedy petitioners seek.

system that, in general, "United States law governs domestically but does not rule the world." *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (citation omitted). In statutory interpretation, that presumption is reflected in the canon that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). That canon "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 133 S. Ct. at 1664.

Petitioners assert (Br. 47) that the presumption against extraterritoriality is relevant only to "interpreting *statutes*," not to defining the scope of a common-law remedy like *Bivens*. But this Court has held otherwise. In *Kiobel*, the Court held that although the presumption "typically" applies to statutory interpretation, "the principles underlying the canon of interpretation similarly constrain courts" recognizing common-law causes of action. 133 S. Ct. at 1664.

Kiobel involved the ATS, a jurisdictional statute that "does not expressly provide any causes of action," but that this Court had previously held is "best read as having been enacted on the understanding that the common law would provide a cause of action for a modest number of international law violations." 133 S. Ct. at 1663 (quoting *Sosa*, 542 U.S. at 724) (brackets omitted). Although the international-law rules asserted by the plaintiffs applied abroad, this Court held that courts recognizing causes of action under the ATS must be guided by the presumption against extraterritoriality. In fact, the Court admonished that "the danger of unwarranted judicial interference in

the conduct of foreign policy is *magnified* in the context of the ATS, because the question is not what Congress has done, but instead what courts may do." *Id.* at 1664 (emphasis added). That danger is still greater in the *Bivens* context, where courts are asked to create a common-law cause of action without even the minimal congressional guidance found in the ATS.

The presumption against extraterritoriality should thus "constrain courts exercising their power" under *Bivens*. *Kiobel*, 133 S. Ct. at 1665. And as this Court recently explained, the presumption counsels against extending a private damages remedy to injuries suffered abroad even if the underlying substantive rule has extraterritorial reach. In *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016), the Court held that some provisions in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, govern foreign conduct. But "despite [its] conclusion that the presumption ha[d] been overcome with respect to RICO's substantive provisions," the Court "separately appl[ied] the presumption against extraterritoriality to RICO's cause of action." *RJR Nabisco*, 136 S. Ct. at 2106. The Court held that the private right of action did not reach injuries suffered abroad—even injuries caused by domestic conduct—because "[n]othing in [RICO] provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States." *Id.* at 2108.[12]

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[12] The Justices who dissented in *RJR Nabisco* "would not [have] distinguish[ed], as the Court d[id], between the extraterritorial compass of a private right of action and that of the underlying proscribed conduct." 136 S. Ct. at 2113 (Ginsburg, J., dissenting). But the dissenting Justices recognized that the situation is differ-

Accordingly, even if Congress had enacted a statute expressly providing a damages remedy for individuals whose constitutional rights are violated by federal officers—and even if petitioners were correct that the Fourth and Fifth Amendments apply in this extraterritorial context—this Court would not extend that statutory remedy to this case absent "clear indication" that Congress intended to reach "injuries suffered outside of the United States." *RJR Nabisco*, 136 S. Ct. at 2108. Given this Court's longstanding reluctance to extend *Bivens*, it would be "grossly anomalous * * * to apply *Bivens* extraterritorially when [courts] would not apply an identical statutory cause of action for constitutional torts extraterritorially." *Meshal*, 804 F.3d at 430 (Kavanaugh, J., concurring).

C. Petitioners Identify No Sound Reason To Extend *Bivens* To The Novel Context Presented Here

Petitioners provide no sound reason to extend *Bivens* for the first time in more than 35 years.

1. Petitioners principally contend (Br. 41-44) that they lack an adequate alternative remedy. But this Court has made clear that while the *presence* of an alternative remedy may preclude the extension of *Bivens*, the "absence of statutory relief for a constitutional violation * * * does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Schweiker*, 487 U.S. at 421-422. "[E]ven in the absence of an alternative," a *Bivens* remedy is inappro-

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ent where, as in *Kiobel* and in this case, courts are not interpreting an extraterritorial statute, but are instead asked "to fashion, on their own initiative, claims for relief that operate extraterritorially." *Id.* at 2113 n.2 (citing *Kiobel*, 133 S. Ct. at 1664).

priate if there are "any special factors counselling hesitation." *Wilkie*, 551 U.S. at 550 (citation omitted). And the Court has instructed that "it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford [the plaintiff] * * * an 'adequate' federal remedy for his injuries." *Stanley*, 483 U.S. at 683. The Court has therefore declined to extend *Bivens* even where that result left no "prospect of relief for injuries that must now go unredressed." *Schweiker*, 487 U.S. at 425; see *Stanley*, 483 U.S. at 683.

Moreover, petitioners err in asserting (Br. 1) that the denial of a *Bivens* remedy "creat[es] a legal no-man's land in which federal agents can kill innocent civilians with impunity." DOJ investigates and prosecutes allegations of excessive force by federal law-enforcement officers, including U.S. Border Patrol agents. It is currently prosecuting an agent for murder based on a cross-border shooting. See *United States* v. *Swartz*, No. 15-CR-1723 (D. Ariz. Sept. 23, 2015). The possibility of such prosecutions provides a strong deterrent against the sort of shootings petitioners posit, and a successful prosecution would also result in an order providing restitution for the victim's family. See 18 U.S.C. 3663A(a); *United States* v. *Cienfuegos*, 462 F.3d 1160, 1165-1169 (9th Cir. 2006).

In addition, the United States is answerable to Mexico for any uses of force across the international border, and the two nations continue to work to reduce such incidents. See p. 20 & notes 8-9, *supra*. In conjunction with those bilateral efforts, U.S. Customs and Border Protection (CBP) has revised its training requirements, use-of-force policies, and investigative practices in the six years since the shooting at issue in this case. U.S. Border Patrol agents are subject to

internal review and discipline under regulations promulgated pursuant to a specific congressional directive. See 8 U.S.C. 1357(a)(5); 8 C.F.R. 287.10. In 2014, the CBP revised its use-of-force policy to incorporate recommendations made by DHS's Inspector General and an independent review body. *CBP Releases Use of Force Policy Handbook and Police Executive Research Forum Report* (May 30, 2014).[13] At the same time, CBP undertook "a comprehensive review and redesign of its basic training curriculum." *Ibid.* And as of February 2015, CBP has instituted a new procedure in which specially trained teams including representatives from the DOJ's Civil Rights Division review every incident in which death or serious injury results from the use of force by a CBP officer.[14]

Furthermore, the Westfall Act protects Agent Mesa from state-law tort suits only because DOJ certified that he was acting within the scope of his employment. 28 U.S.C. 2679(b) and (d). Such "scope-of-employment certification[s] [are] reviewable in court." *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995). And although petitioners did not exercise their right to seek judicial review here, tort remedies are available in instances where federal agents act outside the scope of their employment. See, *e.g.*, *Jamison* v. *Wiley*, 14 F.3d 222, 228-235 (4th Cir. 1994) (upholding DOJ's decision to withdraw a scope certification for an

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[13] https://www.cbp.gov/newsroom/national-media-release/cbp-releases-use-force-policy-handbook-and-police-executive-research.

[14] CBP, *Investigations into Deaths in Custody and Use-of-Force Incidents* ii (July 27, 2015), https://www.dhs.gov/sites/default/files/publications/Customs%20and%20Border%20Protection%20(CBP)%20-%20Investigations%20into%20Deaths%20in%20Custody%20and%20Use-of-Force%20Incidents.pdf.

employee who sexually assaulted a co-worker at work); see also 2 Restatement (Third) of Agency § 7.07(2) (2006) ("An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.").

2. Petitioners also assert (Br. 45) that the arguments against extending *Bivens* to aliens injured abroad impermissibly "double count" the considerations militating against extending the underlying constitutional provisions. In their view, if the Fourth and Fifth Amendments apply to aliens abroad, *Bivens* should too. But the whole premise of the special-factors inquiry is that a judicially created damages remedy is *not* appropriate for every constitutional violation—indeed, "in most instances [this Court] ha[s] found a *Bivens* remedy is unjustified." *Wilkie*, 551 U.S. at 550. The question in every new context is whether Congress, rather than the Judiciary, is the appropriate body to "prescribe the scope of relief that is made available." *Bush*, 462 U.S. at 380. Here, a powerful combination of factors shows that the scope of any damages remedy for aliens injured abroad by U.S. officials is "better left to legislative judgment." *Sosa*, 542 U.S. at 727. Those injuries implicate sensitive questions of diplomacy and national security; Congress has consistently withheld the sort of judicial remedy petitioners seek; and the presumption against extraterritoriality confirms that it would be inappropriate to extend a damages remedy beyond our Nation's borders absent legislative guidance.

II. THE FOURTH AMENDMENT DOES NOT APPLY TO ALIENS IN HERNÁNDEZ'S POSITION

The en banc court of appeals held, without dissent, that the Fourth Amendment did not apply to Agent Mesa's alleged conduct because Hernández was an alien in Mexico who had no connection to the United States. That conclusion was compelled by this Court's decision in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), which held that the Fourth Amendment had "no application" to the search and seizure of a nonresident alien's property in Mexico. *Id.* at 275. Petitioners do not deny that *Verdugo-Urquidez* forecloses their claim. And *Verdugo-Urquidez* is entirely consistent with this Court's subsequent decision in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), which addressed the application of the right to habeas corpus in an area where the United States maintained "*de facto* sovereignty." *Id.* at 755. The Court should therefore decline petitioners' invitation to abandon *Verdugo-Urquidez* in favor of an ill-defined and unworkable totality-of-the-circumstances test for the extraterritorial application of the Fourth Amendment.

A. *Verdugo-Urquidez* Held That The Fourth Amendment Generally Does Not Apply To Aliens Abroad

1. In *Verdugo-Urquidez*, this Court addressed the applicability of the Fourth Amendment to the search and seizure of property located in Mexico and owned by a Mexican citizen. 494 U.S. at 262. Verdugo-Urquidez, a suspected leader of a drug cartel, had been apprehended by Mexican authorities and transported to the United States, where he was held pending trial. *Ibid.* A DEA agent stationed in the United States "arrange[d] for searches of Verdugo-Urquidez's Mexican residences," one of which was in

the border city of Mexicali. *Ibid.* Those searches, which were carried out by DEA agents working with Mexican authorities, resulted in the seizure of evidence implicating Verdugo-Urquidez in the distribution of illegal drugs. *Id.* at 262-263.

The Court framed the question presented as "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." *Verdugo-Urquidez*, 494 U.S. at 261. Although the searches were "arrange[d]" from the United States after Verdugo-Urquidez had been brought to this country, the Court observed that any Fourth Amendment violation "occurred solely in Mexico," the location of the properties subject to the challenged searches and seizures. *Id.* at 262, 264.

In holding that the Fourth Amendment had "no application" to such searches and seizures, *Verdugo-Urquidez*, 494 U.S. at 274-275, the Court conducted a comprehensive analysis using a variety of interpretative methods. It began by noting that the text of the Fourth Amendment codifies a right held by "the people." U.S. Const. Amend. IV. Although the Court viewed the text as "by no means conclusive," it stated that the Framers' use of that term, in contrast with the broader language found in the Fifth and Sixth Amendments, suggests that the Fourth Amendment protects "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265.

The Court placed greater weight on "the history of the drafting of the Fourth Amendment," which shows that "its purpose was to restrict searches and

seizures which might be conducted by the United States in domestic matters." *Verdugo-Urquidez*, 494 U.S. at 266. After reviewing that history, the Court concluded that "it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States." *Ibid.*

The Court also found "no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters." *Verdugo-Urquidez*, 494 U.S. at 267. The Court noted, for example, that in 1798 Congress authorized privateers to seize French vessels, "but it was never suggested that the Fourth Amendment restrained the authority of Congress or of United States agents to conduct operations such as this." *Id.* at 267-268.

The Court then surveyed more than a century of case law and observed that aliens had been afforded constitutional protections only when "they ha[d] come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 271. The Court concluded that although Verdugo-Urquidez was being held in the United States at the time of the challenged searches, he could not claim Fourth Amendment protection under the logic of those decisions because he was "an alien who has had no previous significant voluntary connection with the United States." *Ibid.*

Finally, the Court emphasized that extending the Fourth Amendment to aliens abroad "would have significant and deleterious consequences for the United States." *Verdugo-Urquidez*, 494 U.S. at 273. The

Court noted that "[t]he United States frequently employs Armed Forces outside this country * * * for the protection of American citizens or national security." *Ibid.* And it warned that the application of the Fourth Amendment to such uses of force "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id.* at 273-274.

The Court described the obvious harms that would follow if "aliens with no attachment to this country" could "bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters." *Verdugo-Urquidez*, 494 U.S. at 274. But the Court also cautioned that even if *Bivens* were "deemed wholly inapplicable in cases of foreign activity," extraterritorial application of the Fourth Amendment to aliens would still "plunge [the political branches] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad." *Ibid.* The Court concluded that any restrictions on such searches and seizures "must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *Id.* at 275.

2. For more than a quarter century, this Court and others have understood *Verdugo-Urquidez* to establish that the Fourth Amendment generally does not apply to searches and seizures of aliens outside the United States. See, *e.g. Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (citing *Verdugo-Urquidez* for the proposition that "[i]t is well established that certain constitutional protections available to persons inside

the United States are unavailable to aliens outside of our geographic borders").[15]

That rule forecloses petitioners' Fourth Amendment claim. Petitioners' complaint alleges that Hernández "was a citizen of the Republic of Mexico" and that, at the time of the shooting, he was "on his native soil of Mexico" and "had no interest in entering the United States." Pet. App. 145-147. Hernández thus lacked even the connection to this country held by *Verdugo-Urquidez*, who was lawfully present in the United States when the challenged searches occurred. 494 U.S. at 271-272; see Pet. App. 78.[16] Accordingly, petitioners "cannot assert a claim under the Fourth

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[15] See also, *e.g.*, *United States* v. *Mohamud*, 843 F.3d 420, 439 (9th Cir. 2016); *United States* v. *Emmanuel*, 565 F.3d 1324, 1331 (11th Cir.), cert. denied, 558 U.S. 1099 (2009); *In re Terrorist Bombings*, 552 F.3d 157, 168 (2d Cir. 2008), cert. denied, 558 U.S. 1137 (2010); *United States* v. *Bravo*, 489 F.3d 1, 9 (1st Cir.), cert. denied, 552 U.S. 939 and 552 U.S. 965 (2007); *United States* v. *Davis*, 905 F.2d 245, 251 (9th Cir. 1990), cert. denied, 498 U.S. 1047 (1991).

[16] *Verdugo-Urquidez* held that a nonresident alien's lack of a "previous significant voluntary connection with the United States" excluded him from the protection of the Fourth Amendment even though he had been brought to the United States at the time of the searches. 494 U.S. at 271; see *ibid.* (stating that "aliens receive constitutional protections when they have come within the territory of the United States *and* developed substantial connections with this country") (emphasis added). The Court had no occasion to consider whether an alien who had developed a significant voluntary connection with the United States would be entitled to Fourth Amendment protection while *outside* U.S. territory. That question likewise is not presented here, because Hernández, like the defendant in *Verdugo-Urquidez*, was a "citizen and resident of Mexico with no voluntary attachment to the United States." *Id.* at 274-275.

Amendment" as interpreted in *Verdugo-Urquidez*. Pet. App. 4.

B. Neither Justice Kennedy's Concurring Opinion Nor This Court's Subsequent Decision In *Boumediene* Undermines *Verdugo-Urquidez*'s Holding

Petitioners do not dispute that the rule announced by this Court in *Verdugo-Urquidez* forecloses their Fourth Amendment claim. They also do not attempt to make the showing that this Court demands before overruling one of its precedents. Instead, petitioners assert (Br. 14-27) that *Verdugo-Urquidez* is no longer good law because its purportedly "formalist" approach is inconsistent with the approach to extraterritoriality they contend is reflected in Justice Kennedy's concurrence in that case and the Court's subsequent decision in *Boumediene*. Petitioners are mistaken.

1. Justice Kennedy "join[ed]" "the opinion of the Court" in *Verdugo-Urquidez*, including its holding that the Fourth Amendment generally does not apply to aliens abroad. 494 U.S. at 275 (Kennedy, J., concurring). Justice Kennedy also made clear that his views did not "depart in fundamental respects" from the opinion he joined. *Ibid.*

Justice Kennedy's only expressed disagreement with the Court concerned its reliance "on the reference to 'the people' in the Fourth Amendment." *Verdugo-Urquidez*, 494 U.S. at 276. In all other respects, Justice Kennedy agreed with the Court's analysis, which looked to the "general principles of interpretation" he regarded as controlling, *ibid.*—including the history and purpose of the Fourth Amendment, *id.* at 266; the contemporary understanding of the Framers, *id.* at 267; and the "deleterious consequences" that would follow from the extraterritorial application

of restrictions on searches and seizures developed to constrain domestic law enforcement, *id.* at 273-275. Justice Kennedy endorsed these "other persuasive justifications stated by the Court." *Id.* at 278. And he agreed with the Court that "the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Id.* at 275.[17]

2. Petitioners likewise err in asserting that *Boumediene* implicitly overruled *Verdugo-Urquidez*. *Boumediene* held that the Suspension Clause applies to certain aliens detained by the United States at the Guantanamo Bay Naval Station, where the Court concluded that the United States exercises "complete jurisdiction and control" equivalent to "*de facto* sovereignty." 553 U.S. at 755, 763. The Court rejected the government's argument that the United States' lack of *de jure* sovereignty established that the Suspension Clause had no application at Guantanamo Bay, stating that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764.

Based on the history of the Suspension Clause and this Court's prior decisions, *Boumediene* concluded that the reach of the Clause should be determined based on three factors specifically keyed to that provision's protection of the right to use habeas corpus to test the legality of executive detentions: "(1) the citizenship

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[17] In contrast, Justice Stevens concurred only in the judgment, and did so based on his more limited conclusions that the Fourth Amendment's Warrant Clause does not apply to aliens abroad and that the searches at issue satisfied the Fourth Amendment's reasonableness standard. *Verdugo-Urquidez*, 494 U.S. at 279.

and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." 553 U.S. at 766.

In applying that framework to hold that the petitioners in *Boumediene* were protected by the Suspension Clause notwithstanding their alienage and location outside the *de jure* sovereignty of the United States, the Court repeatedly relied on the fact that "[i]n every practical sense Guantanamo is not abroad" because "it is within the constant jurisdiction of the United States." 553 U.S. at 768-769; see *id.* at 747, 753-754, 764-765, 769, 771 (describing U.S. authority at Guantanamo Bay as "total military and civil control," "complete jurisdiction and control," "complete and uninterrupted control * * * for over 100 years," and "complete and total control"). The Court also emphasized the historic function of the Suspension Clause as a judicially enforceable limit on executive detention. As the Court explained, the Suspension Clause "was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights," and the Clause serves as "an essential mechanism in the separation-of-powers scheme." *Id.* at 739, 743.

3. *Boumediene* thus rested crucially on two factors: the United States' de facto sovereignty over Guantanamo Bay and the tradition and function of habeas corpus as a judicial check on executive detention. This Court's decision did not determine the reach of the Suspension Clause in areas over which the United States does not maintain de facto sovereignty. See *Al*

Maqaleh v. *Gates*, 605 F.3d 84, 96-97 (D.C. Cir. 2010) (holding the Suspension Clause inapplicable inside Bagram Air Force Base in Afghanistan). It also did not define the extraterritorial application of other constitutional provisions—much less overrule *Verdugo-Urquidez*'s specific holding on the extraterritorial reach of the Fourth Amendment.

Verdugo-Urquidez's analysis and holding are, moreover, entirely consistent with *Boumediene*'s approach to the question of extraterritoriality presented in that case. Like *Boumediene*, see 553 U.S. at 739-752, it relied on the history and function of the relevant constitutional provision, see 494 U.S. at 266-268. And like *Boumediene*, see 553 U.S. at 769-770, it carefully considered the practical consequences of extraterritoriality, 494 U.S. at 273-275; see *id.* at 278 (Kennedy, J. concurring). Petitioners' assertion (Br. 18-19) that *Verdugo-Urquidez* reflected "formalism" or relied solely on the Fourth Amendment's textual reference to "the people" ignores these "other persuasive justifications stated by the Court." *Id.* at 278 (Kennedy, J., concurring).

Boumediene thus casts no doubt on the conclusion that, in accordance with *Verdugo-Urquidez*, the Fourth Amendment has no application in this case. Unlike Guantanamo Bay, Northern Mexico, including the area near the border where Hernández was shot, is not under the sovereignty of the United States, de facto or otherwise. That area is sovereign Mexican territory that U.S. personnel generally may not even enter absent permission from the Mexican government. *Boumediene* involved a site where "no law other than the laws of the United States" applied, and where under the Guantanamo Bay lease agreement

Cuba "effectively ha[d] no rights as a sovereign." 553 U.S at 751, 753. Here, in contrast, the United States is answerable to Mexico for any cross-border uses of force. Cf. *id.* at 770 (explaining that the United States was "answerable to no other sovereign for its acts [at Guantanamo Bay]" and contrasting that situation with the military base at issue in *Johnson* v. *Eisenstrager*, 339 U.S. 763 (1950), where the United States was "answerable" to its allies). And whereas the writ of habeas corpus was intended to serve as a post hoc judicial check on executive detentions, the Fourth Amendment is a substantive individual right that was codified to restrain the conduct of domestic law enforcement, that was not understood by the Framers to apply to aliens abroad, and that could significantly interfere with vital American military and intelligence activities if given such extraterritorial application.

C. This Court Should Reject Petitioners' Ad Hoc Approach To The Extraterritorial Application Of The Fourth Amendment

1. Although petitioners purport (Br. 20) to advocate a test for Fourth Amendment extraterritoriality derived from *Boumediene*'s three-factor test for the Suspension Clause, they actually propose an open-ended judicial inquiry into the wisdom of applying the Fourth Amendment based on the totality of the circumstances presented in each case. On petitioners' view, the application of the Fourth Amendment to aliens abroad depends on the intrusiveness of the search or seizure at issue, including whether it resulted in a loss of life (Br. 20); the particular characteristics of the alien—here, that Hernández was "an unarmed civilian teenager" (Br. 21); whether the injury occurred in an area that is part of a "shared border

community" that is "heavily patrolled" (Br. 21-23); whether the U.S. officer was in the United States and subject to compulsory process in foreign courts (Br. 21); the alien's distance from the U.S. border (Br. 21); whether the alien was in an area in which U.S. officers have previously used force (Br. 23); and whether the officer's alleged conduct is inconsistent with U.S. statutes and regulations (Br. 24-25).

Petitioners' open-ended list of factors appears to have been tailor-made to fit the particular circumstances of this case. It has no basis in *Boumediene* or the decisions on which *Boumediene* relied. Although those decisions considered "objective factors and practical concerns," *Boumediene*, 553 U.S. at 764, they did so to reach categorical conclusions about extraterritoriality like the one adopted in *Verdugo-Urquidez*—not to impose open-ended, case-by-case tests like the one petitioners urge here. In *Boumediene*, for example, the Court held that the Suspension Clause "has full effect at Guantanamo Bay"—it did not parse the individual circumstances of particular detainees. *Id.* at 771. Similarly, the Insular Cases adopted categorical rules about the applicability of constitutional provisions in particular territories. See, *e.g.*, *Rasmussen* v. *United States*, 197 U.S. 516 (1905) (holding that the Sixth Amendment applied in Alaska); *Dorr* v. *United States*, 195 U.S. 138 (1904) (holding that the Sixth Amendment did not apply in the Philippines). Petitioners do not cite any decision adopting the sort of ad hoc approach they advocate—much less one imposing such a test to extend constitutional protections to an ill-defined and uncertain class of aliens outside the de jure and de facto sovereignty of the United States.

2. Petitioners' indeterminate approach would, moreover, "plunge [the political branches] into a sea of uncertainty" about the application of the Fourth Amendment to military and intelligence activities abroad. *Verdugo-Urquidez*, 494 U.S. at 274. Such uncertainty would itself be "impracticable and anomalous," *id.* at 278 (Kennedy, J., concurring)—particularly in the Fourth Amendment context, where this Court has repeatedly expressed its "general preference to provide clear guidance to law enforcement through categorical rules." *Riley* v. *California*, 134 S. Ct. 2473, 2491 (2014); see, *e.g.*, *Virginia* v. *Moore*, 553 U.S. 164, 175 (2008).

The need for clarity especially acute abroad, where restrictions on searches and seizures have potential implications not only for law enforcement, but also for military and intelligence activities. As *Verdugo-Urquidez* observed—and as the Nation's experience in the intervening decades has only reinforced—"the protection of American citizens or national security" sometimes requires the use of armed force abroad. 494 U.S. at 273. Similarly, the United States routinely collects intelligence abroad to gather information that is "essential to the national security of the United States." Exec. Order No. 12,333, preamble, 3 C.F.R. 210 (1981 comp.), reprinted as amended in 50 U.S.C. 3001 note (Supp. II 2015).

Both Congress and the Executive Branch have relied on *Verdugo-Urquidez*'s holding that the Fourth Amendment generally does not protect aliens abroad. The Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.*, Executive Order 12,333, and other laws and regulations governing intelligence activities are structured around that understanding.

See, *e.g.*, *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1143-1145 (2013) (discussing FISA provisions governing "foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad"); see also, *e.g.*, 50 U.S.C. 3039(a). The government also conducts other classified intelligence-gathering activities abroad. *Clapper*, 133 S. Ct. at 1149. Petitioners' proposed test would cast a cloud of uncertainty over those vital activities.

To be sure, the government would have arguments that such military and intelligence activities should not be subject to Fourth Amendment scrutiny even under petitioners' amorphous approach. And the government would have strong arguments that such activities would in any event satisfy any Fourth Amendment reasonableness standard that might apply. But as this Court explained, uncertainty about the Fourth Amendment's extraterritorial reach—and the prospect of case-by-case judicial adjudications—could itself "significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Verdugo-Urquidez*, 494 U.S. at 273-274.

3. Petitioners seek to avoid the disruptive implications of their position by asserting (Br. 25) that this case involves only the immediate border area, not "extraterritoriality of the Fourth Amendment more broadly." But even if petitioners' test were so cabined, it would still be unworkable. Under their view (Br. 21-23), courts would have to decide, among other things, whether it would make a difference if (1) the alien is wounded, rather than killed; (2) the alien is an armed adult, rather than an unarmed minor; (3) the alien is searched, rather than seized; (4) the injury occurred

in an isolated area of the border, not a cross-border community; (5) the injury occurred in an area that is not frequently patrolled, rather than one that is; (6) the U.S. official or the alien was a considerable distance from the border, rather than a few feet from it; or (7) the U.S. official was on the Mexican side of the border, working with Mexican authorities. Because petitioners' test is free-floating, rather than grounded in the history or function of the Fourth Amendment, it offers courts no basis for determining whether any of those differences matter.

That uncertainty could raise questions about the government's vital efforts to secure the Nation's borders. For example, the U.S. Border Patrol relies on "sophisticated systems of surveillance," including "'thermal imaging systems,'" and those systems "do not look strictly inward." Pet. App. 79 (citation omitted). Petitioners' test would also raise questions about any joint U.S.–Mexican law-enforcement activities on the Mexican side of the border zone—including one of the searches at issue in *Verdugo-Urquidez* itself, which occurred in the border city of Mexicali, see 494 U.S. at 262. As Judge DeMoss observed, petitioners' approach to extraterritoriality around the border "devolves into a line drawing game" without principled lines—and that game "is entirely unnecessary because there is a border between the United States and Mexico." Pet. App. 107-108.

Another fundamental problem with petitioners' approach is that it is not actually limited to the border area. Petitioners carefully avoid conceding that the Fourth Amendment is inapplicable outside some ill-defined border zone, and they offer no principled basis for drawing such a distinction. To the contrary, the

test they urge this Court to adopt calls for an ad hoc totality-of-the-circumstances inquiry for *all* questions about the application of the Fourth Amendment to aliens abroad. And many of the factors they identify could have broader application.

For example, petitioners assert (Br. 21) that that it is significant that this case involves the loss of life. But situations that "require an American response with armed force"—and thus risk the loss of life—"may arise half-way around the globe." *Verdugo-Urquidez*, 494 U.S. at 275. Petitioners also contend (Br. 21-22) that it is important to the result here that the United States exercises a degree of control across the border because U.S. Border Patrol agents have the ability to use force against individuals in Mexico. But the same could be said about areas near hundreds of military bases and other U.S. installations abroad; about any area patrolled by the U.S. military; or about any location within the reach of U.S. military weapons.

Petitioners also emphasize (Br. 21) that Agent Mesa was in the United States when he fired his weapon. But U.S. military personnel can trigger the use of deadly force abroad from within the United States. An even broader set of searches and seizures abroad are traceable to decisions made within our borders. *Verdugo-Urquidez*, for example, involved searches that occurred in Mexico, but were planned in a DEA office in California. 494 U.S. at 262. Indeed, as this Court observed in a related context, virtually any claim of injury allegedly caused by a U.S. officer in a foreign country can be "repackaged" as a claim based on actions in the United States. *Sosa*, 542 U.S. at 702-703.

Petitioners thus ask this Court to adopt an ill-defined and uncertain test for the extraterritorial reach of the Fourth Amendment. In *Verdugo-Urquidez*, this Court declined to adopt a rule that could have "significantly disrupt[ed] the ability of the political branches to respond to foreign situations involving our national interest" even though the particular facts of that case involved DEA-led searches of two houses in Mexico. 494 U.S. at 273-374. The Court's concerns remain equally weighty today, and they counsel decisively against petitioners' proposed departure from *Verdugo-Urquidez*'s holding.

III. AGENT MESA IS ENTITLED TO QUALIFIED IMMUNITY ON PETITIONERS' FIFTH AMENDMENT CLAIM BECAUSE HIS ALLEGED ACTIONS DID NOT VIOLATE ANY CLEARLY ESTABLISHED FIFTH AMENDMENT RIGHT

All 15 members of the en banc court of appeals agreed that Agent Mesa was entitled to qualified immunity on petitioners' substantive-due-process claim because his alleged actions did not violate any clearly established Fifth Amendment right. Pet. App. 5-6. That unanimous holding was correct.

A. Petitioners' Claim Is Barred By Qualified Immunity Unless Every Reasonable Officer In Agent Mesa's Position Would Have Known That His Alleged Actions Violated The Fifth Amendment

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established * * * constitutional rights of which a reasonable person would have known.'" *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818

1982)). The doctrine is designed to ensure "that fear of liability will not 'unduly inhibit officials in the discharge of their duties,'" *Camreta* v. *Greene*, 563 U.S. 692, 705 (2011) (citation omitted), and that capable individuals are not deterred from public service or distracted from the performance of their responsibilities, *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985). Qualified immunity promotes those objectives by affording "both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation.'" *Iqbal*, 556 U.S. at 672 (citation omitted).

To survive a motion to dismiss based on qualified immunity, a *Bivens* plaintiff must "plead[] facts showing (1) that the official violated a * * * constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Wood*, 134 S. Ct. at 2066-2067 (citation omitted). "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix*, 136 S. Ct. at 308 (citation omitted)). That standard requires either "controlling authority" or "a robust 'consensus of cases of persuasive authority'" establishing that the official's conduct was unconstitutional. *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742 (2011) (citation omitted). The authority need not be "directly on point," but it must be sufficiently similar to place the constitutional question "beyond debate." *Id.* at 741.

As these decisions make clear, the qualified-immunity inquiry is not about the reasonableness or wrongfulness of an official's conduct in the abstract. Instead, qualified immunity applies unless the defendant's actions clearly violated the specific right that

provides the basis for the plaintiff's claim. A right is clearly established for qualified-immunity purposes only if "every reasonable official would have understood that what he is doing violates *that right*." *Mullenix*, 136 S. Ct. at 308 (citation omitted; emphasis added). Accordingly, the "clearly established right" violated by the officer's conduct must "be the federal right on which the claim for relief is based." *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994). Here, petitioners allege that Agent Mesa violated an asserted substantive-due-process right to be free from excessive force. Pet. App. 151. The dispositive question is thus whether "every reasonable official" in Agent Mesa's position "would have understood that what he is doing violates [the Fifth Amendment]." *Mullenix*, 136 S. Ct. at 308 (citation omitted).[18]

B. It Would Not Have Been Clear To Every Reasonable Officer In Agent Mesa's Position That His Alleged Actions Violated The Fifth Amendment

The en banc court of appeals unanimously held that, at the time of the incident at issue here, it was not clearly established that the Fifth Amendment applied to an alleged use of excessive force by a U.S. official against an alien located in Mexico. Pet. App. 5-

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[18] The court of appeals relied on the clearly-established prong of the qualified-immunity inquiry only in rejecting petitioners' Fifth Amendment claim; it rejected their Fourth Amendment claim on the merits. Pet. App. 3-7. But even if this Court were to hold that the Fourth Amendment applied here, Agent Mesa would be entitled to qualified immunity on petitioners' Fourth Amendment claim because *Verdugo-Urquidez* precludes any plausible contention that every reasonable official in Agent Mesa's position would have known that his alleged action violated the Fourth Amendment.

6. Petitioners do not disagree with that characterization of the law, and could not plausibly do so in light of this Court's past recognition that "[i]t is well established that certain constitutional protections," including the Fifth Amendment, "are unavailable to aliens outside of our geographic borders." *Zadvydas*, 533 U.S. at 693. Instead, petitioners maintain (Br. 28-33) that the court of appeals should have conducted the qualified-immunity analysis as if Hernández were a U.S. citizen because Agent Mesa did not know with certainty that Hernández was an alien at the time of the incident. Petitioners are correct that the qualified-immunity analysis focuses on facts known to the defendant at the time of the challenged conduct. But that means that the question in this case is whether every reasonable officer in Agent Mesa's position would have known that the Fifth Amendment applies to the use of force against an individual of unknown nationality located outside the United States, where the officer has no reason to believe that the individual is a U.S. citizen. And for two independent reasons, the answer to that question is no.

1. Petitioners are correct (Br. 28-31) that qualified-immunity focuses on facts known to the officer at the time of the challenged conduct. This Court has explained that the "dispositive inquiry" is "whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*," *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added), and the Court has therefore focused on the facts that the officer "reasonably understood" when he acted, *Mullenix*, 136 S. Ct. at 312; see *White* v. *Pauly*, No. 16-67 (Jan. 9, 2017), slip op. 3 ("Because this case concerns the defense of qualified immunity * * * the

Court considers only the facts that were knowable to the defendant officers."). That approach follows from the goal of ensuring that officials are held liable in damages only if they violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix*, 136 S. Ct. at 308 (quoting *Harlow*, 457 U.S. at 818). That standard is not satisfied if the application of a right was not clear based on the facts known to the officer.

2. Petitioners assert that the court of appeals departed from the proper approach to qualified immunity by relying on Hernández's status as an alien, a fact that petitioners contend was unknown to Agent Mesa at the time of the incident.[19] As the government explained in its brief in opposition (at 15), the court did not expressly address the after-acquired facts issue on which petitioners now focus. Had it done so, it might have framed the qualified-immunity question more precisely, to account for Agent Mesa's asserted lack of certainty about Hernández's nationality. But that framing would not have altered the court's ultimate conclusion, because no precedent clearly establishes how the Fifth Amendment applies where, as here, an officer confronts a person of unknown nationality outside the United States who the officer has no reason to believe is a U.S. citizen.

Petitioners observe that, as a general matter, it is clearly established that a law enforcement officer

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[19] Petitioners also briefly assert (Br. 31) that Agent Mesa did not know that Hernández was in Mexico. But that assertion contradicts petitioners' complaint, which alleges that Hernández was "standing * * * on his native soil of Mexico" at the time of the incident and that Agent Mesa "pointed his weapon across the border" before firing. Pet. App. 146-147.

"may not seize an unarmed, nondangerous suspect by shooting him dead." Pet. Br. 34 (quoting *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985). But the decisions petitioners cite to support that proposition involved individuals in the United States. See *Garner*, 471 U.S. at 3-4; *Torres* v. *City of Madera*, 648 F.3d 1119, 1121 (9th Cir. 2011), cert. denied, 132 S. Ct. 1032 (2012); *K.H.* v. *Morgan*, 914 F.2d 846, 848 (7th Cir. 1990). The "situation [Agent Mesa] confronted," *Saucier*, 533 U.S. at 202, was different. Petitioners' complaint alleges that Hernández was in Mexico at the time of the incident, and petitioners do not allege any facts suggesting that Agent Mesa had any reason to believe that Hernández was a U.S. citizen. Pet. App. 146-147. To the contrary, the complaint indicates that Agent Mesa believed (correctly) that Hernández was *not* a U.S. citizen because it alleges that Agent Mesa was "attempting to apprehend him * * * on suspicion of illegal entry into the United States." *Id.* at 151.

Petitioners cite no decision addressing the application of the Fifth Amendment to an officer's use of force against a person who is outside our Nation's territory and who the officer has no reason to believe is a U.S. citizen.[20] Petitioners instead contend (Br. 36) that Agent Mesa is not entitled to qualified immunity because petitioners allege that he engaged in conduct

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[20] Indeed, this Court has not addressed the application of the Fifth Amendment to U.S. citizens in such circumstances. And in other contexts, it has indicated that even citizens abroad lack constitutional rights under some circumstances. See *Boumediene*, 553 U.S. at 760-761 (discussing *In re Ross*, 140 U.S. 453 (1891)); see also *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring); *Reid* v. *Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result).

that, if proved, would violate U.S. Border Patrol regulations governing the use of force, federal and state murder statutes, and international law. But those other sources of law have no bearing on the qualified-immunity inquiry. "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision," even if the relevant statute or regulation "advance[s] important interests or was designed to protect constitutional rights." *Davis* v. *Scherer*, 468 U.S. 183, 194-195 (1984); see *Elder*, 510 U.S. at 515. Instead, the question is whether the contours of the specific constitutional right on which petitioners rely—the Fifth Amendment—were "sufficiently clear that every reasonable official" in Agent Mesa's situation "would have understood that what he is doing violates *that right*." *Mullenix*, 136 S. Ct. at 308 (citation omitted; emphasis added). And because petitioners identify no authority addressing the application of the Fifth Amendment to the novel circumstances presented here, the answer to that question is no.

3. Agent Mesa is also entitled to qualified immunity for an independent reason unrelated to Hernández's citizenship or to any issue about after-acquired facts: It is not clearly established that an excessive-force claim like this one can ever be asserted under the Fifth Amendment, or whether such claims must arise, if at all, only under the Fourth Amendment. See U.S. Br. in Opp. 16-17.

"Because the Fourth Amendment provides an explicit textual source of constitutional protection" against seizures, this Court has held that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, in-

vestigatory stop, or other 'seizure' of a free citizen," as distinct from a person in custody, "should be analyzed under the Fourth Amendment * * * rather than under a 'substantive due process' approach." *Graham* v. *Connor*, 490 U.S. 386, 395 (1989). That principle precludes reliance on the Fifth Amendment "if [a plaintiff's] claim is 'covered by' the Fourth Amendment." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 843 (1998).

Here, petitioners' claim is "covered by" the Fourth Amendment in the sense that it involves a "seizure[]." *Lewis*, 523 U.S. at 843. Petitioners allege that Agent Mesa shot Hernández "while attempting to apprehend him," Pet. App. 151, and "there can be no question that apprehension by the use of deadly force is a seizure," *Garner*, 471 U.S. at 7. Accordingly, the district court and four members of the court of appeals concluded that petitioners' Fifth Amendment claim fails on the merits because "if [petitioners] have any claim at all, it arises from the Fourth, not the Fifth Amendment." Pet. App. 11 (Jones, J., concurring); see *id.* at 117-118.

Judge Prado disagreed, concluding that because the Fourth Amendment does not apply extraterritorially, it does not "cover" the excessive-force claim at issue here and thus does not preclude resort to substantive due process. Pet. App. 33-36. But Judge Prado did not suggest that the applicability of the Fifth Amendment to facts like these was clearly established. To the contrary, it appears that no appellate decision has addressed that question. The disagreement among the members of the court of appeals on that question of first impression reinforces the absence of clearly established law. "If judges disagree

on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999); accord *al-Kidd*, 563 U.S. at 743. And the fact that the threshold applicability of the Fifth Amendment was not clearly established provides an independently sufficient basis for holding that Agent Mesa is entitled to qualified immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
IRVING L. GORNSTEIN
Counselor to the Solicitor General
BRIAN H. FLETCHER
Assistant to the Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MARK B. STERN
MARY HAMPTON MASON
HENRY C. WHITAKER
Attorneys

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